Office - Supreme Court, U.S.
FILED
MAR 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED HOME RENTALS, INC., *et al.*,
Petitioners,

v.

TEXAS REAL ESTATE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

JOHN E. KENNEDY
3315 Daniel
Dallas, Texas 75275
Of Counsel

H. BARTOW FARR, III
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

*STEVE BRUTSCHÉ
JONES & BRUTSCHÉ
3000 Turtle Creek Plaza #116
Dallas, Texas 75219
(214) 522-4870

**Counsel of Record*
for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. *The Eleventh Amendment*	1
II. *Abstention*	4
CONCLUSION	7
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Aldens, Inc. v. Ryan, 454 F. Supp. 465 (W.D. Okla. 1976), *aff'd on other grounds*, 571 F.2d 1159 (10th Cir. 1978) 2, 3

Clark v. Barnard, 108 U.S. 436 (1883) 2

In re Crisp, 521 F.2d 172 (2d Cir. 1975) 2

C-Y Development Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983) 5

Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982) 2

Department of Education v. Katherine D., 531 F. Supp. 517 (D. Hawaii 1982) 3

Ex Parte Ayers, 123 U.S. 442 (1887) 3

Gallagher v. Continental Ins. Co., 502 F.2d 827 (10th Cir. 1974) 2

Gunter v. Atlantic Coast Line Railroad Co., 200 U.S. 273 (1906) 2

Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 4

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 2

Mohegan Tribe v. State of Connecticut, 528 F. Supp. 1359 (D. Conn. 1982) 2

Moore v. Sims, 442 U.S. 415 (1979) 4

Mullaney v. Anderson, 342 U.S. 415 (1952) 4

Newfield House, Inc. v. Massachusetts Dept. of Public Welfare, 651 F.2d 32 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981) 2, 3

New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979) 2

Younger v. Harris, 401 U.S. 37 (1971) 4

STATUTES AND RULES:

The Eleventh Amendment of The United States Constitution ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1361

UNITED HOME RENTALS, INC., *et al.*,
Petitioners,

v.

TEXAS REAL ESTATE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition to the petition for certiorari adds little to the reasoning of the court of appeals on the abstention issue, but raises for the first time a spurious Eleventh Amendment defense. Petitioners submit this short reply to address the latter issue as well as a few remaining aspects of the abstention question.

I. *The Eleventh Amendment*

Respondents' first contention is that they, as a State and a state commission, are protected from suit by the Eleventh Amendment. This argument simply cannot be squared with the way in which this case was presented to the district court. Any Eleventh Amendment immunity that respondents could have asserted became irrelevant when they joined with petitioners in a motion affirmatively asking the district court to decide the merits based

on a set of stipulated facts. *See* Joint Motion of the Plaintiffs and Defendants for the Court to Rule on the Merits and Not Abstain, in the Appendix to this brief. At that point, respondents "became . . . actor(s) as well as defendant(s)," *Clark v. Barnard*, 108 U.S. 436, 448 (1883), and gave up any right to challenge the resulting court decision under the Eleventh Amendment.

It is well established that "where a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the provisions of the 11th Amendment." *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 284 (1906). This principle applies even where the state or state agency is technically the "defendant," but has taken affirmative steps to seek an adjudication of its rights in federal court. Thus, efforts to invoke the Eleventh Amendment have been rejected where state defendants had previously sought and won removal of the case to federal court,[1] had filed a counterclaim of their own,[2] had filed a claim to a fund in bankruptcy,[3] or had agreed to a consent decree only later to resist its implementation.[4]

---

[1] *Newfield House, Inc. v. Massachusetts Dept. of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981); *Gallagher v. Continental Ins. Co.*, 502 F.2d 827, 830 (10th Cir. 1974).

[2] *See Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359, 1367 (D. Conn. 1982); *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 470 (W.D. Okla. 1976), *aff'd on other grounds*, 571 F.2d 1159 (10th Cir. 1978) (alternative holding).

[3] *Clark v. Barnard*, 108 U.S. 436, 448 (1883); *In re Crisp*, 521 F.2d 172, 178 (2d Cir. 1975) (alternative holding). *See also Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 555 (S.D. Fla. 1982) (filing claim to wreck in admiralty *in rem* suit).

[4] *New York State Ass'n for Retarded Children v. Carey*, 596 F.2d 27, 39 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979) (alternative holding); *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).

In light of these precedents, respondents clearly are in no position to assert the Eleventh Amendment here. Their decision to resist any transfer of the case to state court and seek a merits ruling based on stipulated facts represented an affirmative invocation of the power of the district court. We see no constitutional distinction between that behavior and the decision to seek removal to federal court,[5] or, indeed, an effort to secure a declaratory judgment. As the court put it in *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 470 n.3 (W.D. Okla. 1976), *aff'd on other grounds*, 571 F.2d 1159 (10th Cir. 1978), a case where a state defendant had counterclaimed and submitted the case for decision on stipulated facts, such conduct simply is "inconsistent with the assertion of Eleventh Amendment immunity."[6] At the same time, because they would create a "no lose" situation for state defendants,[7] such tactics "would if allowed work a virtual fraud on the federal court and opposing litigants." *Newfield House, Inc. v. Massachusetts Department of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981).

In light of the state's affirmative decision to seek a judgment from the federal court, this case does not involve "the indignity of subjecting a State to the coercive process of judicial tribunals * * *." *Ex Parte Ayers*, 123 U.S. 442, 505 (1887). Nor, by its unfettered choice to invoke federal jurisdiction, has the State surrendered any real protection against a decision on the merits. Because petitioners have sought only injunctive relief on federal

---

[5] See note 1, *supra*.

[6] *See also Department of Education v. Katherine D.*, 531 F. Supp. 517, 529 (D. Hawaii 1982) (Eleventh Amendment claim barred where state chose to appeal administrative ruling to federal rather than state court).

[7] Such defendants could submit the case to the federal court, knowing that any unfavorable decision would be voidable under the Eleventh Amendment.

constitutional grounds, a decision to raise an Eleventh Amendment defense, instead of submitting the case for decision, would have led only to a substitution of individual state defendants and the same prohibition against denying petitioners their constitutional rights.[8] There is thus no state interest present here that would justify second-guessing the Attorney General's decision to disregard this issue and instead affirmatively seek a ruling in the name of the existing defendants. Having made that choice, respondents have no right to challenge the power of the court to issue the very ruling that they themselves requested.

II. *Abstention*

Respondents' discussion of *Pullman* abstention is equally unpersuasive. Although they do not dispute that many courts of appeals, unlike the Fifth Circuit, require identification of an important state interest to be served by such abstention, they nonetheless appear to suggest that this factor is irrelevant in *Pullman* abstention cases.[9]

---

[8] Indeed, if there were a live Eleventh Amendment claim in this case, this Court itself could make this technical change in the named defendants, while proceeding with the merits of the petition for certiorari. *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952). This change would cause no prejudice whatever to the State. On the other hand, "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste." *Id.*

[9] Respondents cite *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 83-84 (1975), and *Moore v. Sims*, 442 U.S. 415, 427-28 (1979), for this proposition. Yet in *Harris* the Court cautioned that abstention should be invoked only in "special circumstances," such as where the issues are "matters peculiarly within the province of the local courts." 420 U.S. at 83-84. Similarly, *Moore v. Sims*, recognized that in *Pullman*, "the Court observed that the dispute before it implicated 'a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.'" 442 U.S. at 427.

We note, in this regard, that *Moore v. Sims* was a case applying the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971),

Resp. Opp. at 9. As we have noted in our petition, such confusion about the scope of the *Pullman* doctrine is precisely why review by this Court is appropriate. Pet. 9-14. Perhaps recognizing the awkwardness of their position, respondents also engage in inventive suppositions about the state interests that the court of appeals *could* have considered had it chosen to do so. Even if this were an adequate way to support the decision below, it would fail here because the "state interests" proposed by respondents make little sense.

Respondents first suggest that the State has an interest in having its statute construed by a state court. Resp. Opp. at 7-8. While we do not dispute that this interest should be given some weight, the effort to make it controlling would simply erase this factor as a separate criterion in *Pullman* cases. By definition, this factor is present whenever an abstention question is created by a federal-court challenge to a state statute. Yet the Ninth Circuit, in its three-part test, requires the presence of a "sensitive area of social policy" quite apart from a doubtful, and possibly determinative, issue of state law. See Pet. 10-11; *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

Second, respondents suggest that abstention served a state interest because the district court's constitutional holding left the State "stripped of legislation protecting Texas consumers from the unscrupulous." Resp. Opp. at 8. That argument simply misses the point. The whole purpose of abstention, as envisioned by the Fifth Circuit, would be to allow the state courts an opportunity to *narrow* the state law to exclude the category of persons represented by petitioners. If that opportunity was utilized

---

which involved federal court interference with *ongoing* state proceedings. The passage from *Moore* quoted in Respondents' brief at 9 must be read in light of the greater intrusion on state sovereignty inherent in any federal constitutional ruling that interferes with ongoing state adjudication.

by a state court, the scope of state law would then be no broader, and possibly narrower, than under the terms of the district court's constitutional ruling. Any benefit to consumers from abstention, therefore, could only result from the delays entailed in seeking a state court interpretation, *i.e.*, from the possibility that respondents will be able, in the interim, to continue to apply a law held by the district court to be unconstitutional.

The plain fact is that no particular state interest would be served by abstention here, as the State itself recognized in the joint motion informing the district court that "state law is clear [and] *Pullman* type abstention is not required." *See* Appendix. Even if this motion by the parties did not technically bind the district court, it is certainly indicative of the dubious validity of state interests asserted in this Court now that, after losing on the merits, respondents have decided that they no longer "object" to *Pullman* abstention.[10] Resp. Opp. at 10.

Respondents are no more convincing in their suggestion that the delays created by abstention would cause no "undue hardship" to petitioners. Resp. Opp. at 10. This argument seems to be premised on the fact that the unlicensed employees originally employed by petitioner United Home Rentals now have licenses. While this may be true, it is equally clear that unlicensed persons are currently working for United Home Rentals. *Id.* Their right to do so remains a central issue in the case. Obviously, petitioners retain a strong interest in obtaining a favorable ruling as quickly as possible.

Finally, respondents betray only confusion in their attempt to dismiss the second issue raised in the petition—

---

[10] In another portion of the joint motion, the parties stated that "[t]here are no unsettled questions of State law involved in this case." *See* Appendix. Yet they now contend that the "federal issue is dependent upon the unclear and unresolved state law." Resp. Opp. at 8.

the proper standard for review of an abstention ruling in the court of appeals. Although they say that they support the Fifth Circuit's *"de novo"* review standard, they appear to be referring instead to the undisputed power of a court of appeals to raise the issue of abstention *sua sponte*. Resp. Opp. at 11. In any event, it remains clear that the *de novo* standard applied here conflicts with the well-established rule in a number of other circuits. *See* Pet. at 15-17. The proper standard to be applied remains an issue worthy of consideration by this Court.

CONCLUSION

The decision below raises serious issues that the circuits have failed to resolve uniformly. This Court should grant a writ of certiorari to resolve them.

Respectfully submitted,

JOHN E. KENNEDY
3315 Daniel
Dallas, Texas 75275
Of Counsel

H. BARTOW FARR, III
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

*STEVE BRUTSCHÉ
JONES & BRUTSCHÉ
3000 Turtle Creek Plaza #116
Dallas, Texas 75219
(214) 522-4870
**Counsel of Record*
for Petitioners

March 23, 1984

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-81-0809-C

UNITED HOME RENTALS, INC.,
MICHAEL A. LIVINGSTON, AND W. EUGENE BUSHMAN,
Plaintiffs,

vs.

TEXAS REAL ESTATE COMMISSION,
AND THE STATE OF TEXAS,
Defendants.

[Filed Jul. 8, 1982]

JOINT MOTION OF THE PLAINTIFFS AND DEFENDANTS FOR THE COURT TO RULE ON THE MERITS AND NOT ABSTAIN

TO THE HONORABLE JUDGE OF SAID COURT:

COME Plaintiffs, United Home Rentals, Michael Livingston and W. Eugene Bushman, and Defendants, Texas Real Estate Commission and The State of Texas, and move the Court to rule on the merits and render Judgment thereon and not to abstain therefrom, and in support thereof would show the Court as follows:

1. There are no unsettled questions of State law involved in this case with regard to the coverage of the Real Estate Licensing Act to the activities of Plaintiffs and their agents and employees.

2. The State has acted to revoke the licenses of Plaintiffs' employees and agents and has refused to grant li-

censes of Plaintiffs' agents. These actions are final unless contested by Plaintiffs and/or their agents, therefore there is a case or controversy between the parties.

3. Plaintiffs are not required to exhaust their administrative remedies and have standing to assert the constitutional rights applicable to their employees in this matter.

4. To the degree necessary, Defendants waive any right they may have to seek abstention by the Court on any basis.

5. This motion is based upon the Stipulations contained in the PreTrial Order, orally made by the parties in their opening statements, and by the additional stipulations filed herein. To the degree abstention is applicable, it is waivable, both by the express action of the Defendants in not asserting it and by their affirmative conduct in this case. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329, 84 S.Ct. 1293, 1296 (1964).

6. In that State law is clear, *Pullman* type abstention is not required. See *Wright and Miller*, Section 4242, pages 455-458 and cases cited thereunder.

7. The requirement of exhaustion of administrative remedies is an extension of "*Younger v. Harris*" type abstention which is waivable. See *Wright Miller*, Section 4245, pages 547, 548.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs and Defendants pray that this Honorable Court adjudicate the above numbered and entitled cause on the merits and not abstain.

Respectfully submitted,

WEIL, BRUTSCHE & CLEMENTS
A Professional Corporation

By: /s/ Steve Brutsche
STEVE BRUTSCHE
State Bar No. 03262400

2200 North Tower, Lock Box 364
Plaza of the Americas
Dallas, Texas 75201
(214) 742-9441

Attorneys for Plaintiffs

/s/ Nancy N. Lynch
NANCY N. LYNCH
Assistant Attorney General
State of Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Defendants